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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JOSE JIMENEZ-MORA, Defendant and Appellant.	A140917 (San Francisco County Super. Ct. No. 218638)

Defendant Jose Jimenez-Mora appeals following a jury trial, arguing instructional error, improper destruction of evidence favorable to the defense, improper exclusion of defense evidence, and cumulative error. He also asks us to independently review materials examined by the trial court pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). We affirm.

BACKGROUND

A jury found appellant guilty of driving under the influence of alcohol causing injury (Veh. Code, § 23153, subd. (a); count one), driving with a blood alcohol level of 0.08 percent or more causing injury (Veh. Code, § 23153, subd. (b); count two), and failing to stop at the scene of a vehicle accident that caused property damage (Veh. Code, § 20002, subd. (a); count three).[1] The jury also found true allegations, with respect to counts one and two, that appellant had a blood alcohol level of 0.15 percent or more

[1] Prior to trial, appellant pled guilty to an additional charge of driving without a license (Veh. Code, § 12500, subd. (a)).

(Veh. Code, § 23578), caused bodily injury to four victims (Veh. Code, § 23558), caused great bodily injury to four victims (Pen. Code, § 12022.7, subd. (a)), and caused one victim to suffer permanent paralysis (Pen. Code, § 12022.7, subd. (b)).

Prosecution Case

At approximately 12:30 a.m. one night in October 2011, Dylan Brody's car was sideswiped by a white van as he was driving in San Francisco. The white van drove off without stopping. Anthony Thomas witnessed this incident and pursued the white van on his bicycle for several blocks. Thomas then heard another collision. Although he did not witness this collision, when he approached he saw it involved the same white van.

Todd Banks was sitting in his parked car when he saw in his rearview mirror a white van approaching fast. The van passed Banks, ran a red light, and proceeded to run a red light at the next intersection. In the middle of that intersection, the van collided with a black car that was also driving through the intersection.

A responding officer testified appellant told him, on the night of the collision, "I ran a red light, and then the car hit me." Darren Paez had been driving the black car with five passengers. Paez and three of the passengers were seriously injured by the accident. The passengers who testified at trial had no memory of the collision.[2]

Blood drawn approximately two hours after the collision showed appellant had a blood alcohol content of 0.21 percent and cocaine at a concentration of 0.05 milligrams per liter. Paez had a blood alcohol content of 0.08 percent, cocaine at a concentration of 0.10 milligrams per liter, and evidence of marijuana consumption.

An expert in accident investigation and traffic collision reconstruction estimated the speed of appellant's van at the time of impact was approximately 38 miles per hour, and the speed of Paez's car was approximately 36 miles per hour. He determined that the front of appellant's van struck the right side of Paez's car.

[2] Paez invoked his Fifth Amendment right against self-incrimination and the trial court found him unavailable to testify at trial.

Defense Case

Appellant testified on his own behalf. On the night in question, he drank two large bottles of beer and most of a third bottle. He then used cocaine before starting to drive home. He testified the alcohol and cocaine did not affect his driving at all. He did not sideswipe another car before the collision with Paez. When he entered the intersection where the collision took place, the light was yellow. Appellant was accelerating because he wanted to pass through before the light turned red. When he was about halfway through the intersection, right after the light turned red, the collision occurred. He explained that he told the police he ran a red light because he thought that was the correct phrase for failing to clear an intersection before the light turned red.

A responding officer testified Paez told him, on the night of the collision, that he had drunk two or three shots of tequila, a couple of beers, and some other drinks that he could not remember. The officer testified the speed limit for both streets at the intersection of the collision was 25 miles per hour.

Daniel Girvan testified as an expert in accident reconstruction. He opined appellant's van was traveling at 41 miles per hour at the time of impact, and Paez's car was traveling 30 miles per hour. An engineer from the San Francisco Municipal Transportation Agency testified that on the night of the collision, the traffic lights at the relevant intersection had a period of 0.5 seconds when all of the lights were red to allow traffic to clear the intersection.

DISCUSSION

I. *Causation Instructions*

The jury was instructed with respect to causation with CALCRIM No. 240, as follows: "An act or omission causes injury if the injury is the direct, natural, and probable consequence of the act or omission and the injury would not have happened without the act or omission. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence. [¶] There may be more than one cause of injury. An act or omission causes

injury, only if it is a substantial factor in causing the injury. A *substantial factor* is more than a trivial or remote factor. However, it does not have to be the only factor that causes the injury."[3]

Appellant argues it was error for the trial court to fail to include an additional instruction on superseding cause. Appellant points to the following instruction provided by the trial court in *People v. Pike* (1988) 197 Cal.App.3d 732, 747, fn. 3: " 'An intervening act may be so disconnected and unforeseeable as to be a superseding cause, that in such a case the defendant's act will be a remote and not a proximate cause.' " Appellant argues: "Assuming arguendo that appellant was driving while intoxicated and was speeding, if Paez and not appellant ran the red light, Paez's conduct was a superseding cause which exonerated appellant from culpability for causing the collision." He explains, "Paez's conduct, i.e., driving while intoxicated, speeding, and running the red light" was "entirely unforeseeable."

The People contend appellant has forfeited this argument by failing to object to the causation instruction below. Appellant concedes he did not object below, but argues the trial court had a sua sponte duty to instruct on superseding cause. We conclude appellant has forfeited this argument.

" ' " 'It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.' [Citation.]" ' [Citation.] The court has a sua sponte duty to instruct on defenses when ' "it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." ' [Citation.] Yet this duty is limited: 'the trial court cannot be required to anticipate every possible

[3] The jury received this instruction as a general instruction, and received essentially the same instruction as part of the instructions for counts one and two (see CALCRIM Nos. 2100, 2101).

theory that may fit the facts of the case before it and instruct the jury accordingly. [Citation.] Thus, the court is required to instruct sua sponte only on general principles which are necessary for the jury's understanding of the case. It need not instruct on specific points or special theories which might be applicable to a particular case, absent a request for such an instruction.' " (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488–489 (*Garvin*) [where trial court properly instructed jury on "basic principles of self-defense" and "the concept of antecedent assaults [impacting the reasonableness of the defendant's use of force] is fully consistent with the general principles that are expressed therein," there was no sua sponte duty to issue additional instruction on antecedent assaults].)

We now consider the legal principles of causation at issue here. " 'The criminal law . . . is clear that for liability to be found, the cause of the harm not only must be direct, but also not so remote as to fail to constitute the natural and probable consequence of the defendant's act.' " (*People v. Cervantes* (2001) 26 Cal.4th 860, 869 (*Cervantes*).) " 'In general, an "independent" intervening cause will absolve a defendant of criminal liability. [Citation.] However, in order to be "independent" the intervening cause must be "unforeseeable . . . an extraordinary and abnormal occurrence, which rises to the level of an exonerating, superseding cause." [Citation.] On the other hand, a "dependent" intervening cause will not relieve the defendant of criminal liability. "A defendant may be criminally liable for a result directly caused by his act even if there is another contributing cause. If an intervening cause is a normal and reasonably foreseeable result of defendant's original act the intervening act is 'dependent' and not a superseding cause, and will not relieve defendant of liability. [Citation.] '[ ] The consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough. [ ] The precise consequence need not have been foreseen; it is enough that the defendant should have foreseen the possibility of some harm of the kind which might result from his act.' " ' " (*Id.* at p. 871; see also *People v. Fiu* (2008) 165 Cal.App.4th 360, 371–372 (*Fiu*).)

The jury was instructed on general principles of causation, including an instruction that incorporated the principle of foreseeability (albeit without using that precise word): "An act or omission causes injury if the injury is the direct, natural, and probable consequence of the act or omission . . . . A *natural and probable consequence* is one that *a reasonable person would know is likely to happen if nothing unusual intervenes*." (Second italics added.) The trial court therefore instructed the jury on the general principles relating to appellant's causation defense. The instructions provided were a correct statement of the law; appellant does not contend otherwise. The additional instruction identified by appellant on appeal is a pinpoint or amplifying instruction and the trial court had no obligation to issue it sua sponte. (*Fiu, supra,* 165 Cal.App.4th at p. 370 [where jury was instructed on general principles of causation, argument that trial court failed to instruct on superseding cause was "waived by [the] defendant's failure to request it below"]; see also *Garvin, supra,* 110 Cal.App.4th at p. 489.) Appellant has therefore forfeited this argument.[4]

To the extent appellant argues the instructions could be construed to mean appellant could be found guilty even if Paez's conduct was a superseding cause, our review asks " 'whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant's rights.' " (*Fiu, supra,* 165 Cal.App.4th at p. 370.) Because the jury was instructed that the injuries must have been a consequence of appellant's act "that a reasonable person would know is likely to happen if nothing unusual intervenes," we find no reasonable likelihood the jury would have construed the instruction in the manner suggested by appellant. (See *id.* at p. 372 [instruction "requiring an injury or death to be a direct, natural, and probable

[4] For the reasons discussed below, we disagree with appellant's contention that the lack of a superseding cause instruction affected his substantial rights and is therefore reviewable despite his failure to object below. (Pen. Code, § 1259; *People v. Christopher* (2006) 137 Cal.App.4th 418, 426–427 ["[A]n appellate court may review any instruction given even though no objection was made in the lower court if the substantial rights of the defendant are affected. [Citation.] The cases equate 'substantial rights' with reversible error, i.e., did the error result in a *miscarriage of justice?*"].)

consequence of a defendant's act necessarily refers to consequences that are reasonably foreseeable"].)

Appellant also argues his trial counsel was ineffective for failing to request the instruction on superseding cause. We need not decide whether trial counsel's performance was deficient because we find no prejudice. (*People v. Ledesma* (1987) 43 Cal.3d 171, 217.) As discussed above, the jury was instructed that the injuries must have been a consequence of appellant's conduct "that a reasonable person would know is likely to happen if nothing unusual intervenes." During closing arguments, appellant's trial counsel quoted this language to the jury and argued: "[Appellant] was legally in the intersection . . . . And he should have been able to pass through, but something unusual did intervene: Darren Paez. [¶] Darren Paez, while intoxicated, ran the red light at the intersection . . . ." Appellant has failed to demonstrate why the jury, which convicted him after this instruction and argument, would have reached a different result with the instruction proposed by appellant on appeal. (*Fiu, supra,* 165 Cal.App.4th at p. 377 [finding harmless any error in failing to issue superseding cause instruction in part because "[t]he instructions given, when considered as a whole, adequately conveyed the law of causation, and defense counsel was able to argue the issue to the jury"].) Moreover, the evidence that appellant was speeding and intoxicated was overwhelming, and it is not reasonably probable the jury would have found a collision is *not* a reasonably foreseeable consequence of such conduct. (*Cervantes, supra,* 26 Cal.4th at p. 871 [" 'The precise consequence need not have been foreseen; it is enough that the defendant should have foreseen the possibility of some harm of the kind which might result from his act.' "].)

II. *Destruction of Evidence*

A. *Background*

Before trial, appellant filed a motion to dismiss on the ground the police had destroyed evidence; specifically, Paez's car. The police released Paez's car shortly after the collision and it was subsequently destroyed. The trial court held an evidentiary hearing on the motion.

Inspector Clifford Cook testified that he was the lead investigator of the collision. After the police took photographs of Paez's car, Cook did not believe the physical car had evidentiary value. He did not know whether Paez's car had a "black box," or electronic data recorder (EDR), and in any event the police had "no way of examining" an EDR. The police did not examine the EDR from appellant's van. Cook did not know whether an EDR would record the speed of a vehicle at the time of impact. Cook released the car at Paez's request.

Girvan, the defense expert at trial, also testified at the evidentiary hearing. He testified Paez's car, based on its make, model, and year, had an EDR. The EDR would likely have contained "data for two seconds prior to the crash," including "the speed, the engine throttle position, the accelerator pedal position, [and] brake status." Girvan also testified that a visual inspection of Paez's car would have enabled him to "make a better assessment as to the speeds of the vehicle at impact" and determine "which restraining systems were used within the vehicle."

The trial court denied the motion to dismiss, finding appellant failed to show the evidence had evident exculpatory value at the time it was released or that the police acted in bad faith. The trial court also denied appellant's subsequent request for a jury instruction regarding the destruction of Paez's car.

B. *Analysis*

" 'Law enforcement agencies have a duty, under the due process clause of the Fourteenth Amendment, to preserve evidence "that might be expected to play a significant role in the suspect's defense." [Citations.] To fall within the scope of this duty, the evidence "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." [Citations.] The state's responsibility is further limited when the defendant's challenge is to "the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." [Citation.] In such case, "unless a criminal defendant can show bad faith on the part of

the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." ' " (*People v. Carter* (2005) 36 Cal.4th 1215, 1246.) " 'On review, we must determine whether, viewing the evidence in the light most favorable to the superior court's finding, there was substantial evidence to support its ruling.' " (*Ibid.*)

Substantial evidence supports the trial court's ruling. The evidence showed only that Paez's car *might* have revealed evidence favorable to appellant; this is not sufficient to support a finding that the evidence had apparent exculpatory value. (*People v. Duff* (2014) 58 Cal.4th 527, 549–550 [apparent exculpatory value of car not shown where the defendant contended solely that "if it had been preserved, the car could have been subjected to additional tests beyond those conducted by the People's expert, tests whose results might have supported [the defendant's] theory"].) There was ample evidence in Cook's testimony that the police did not act in bad faith.

We also find no error in the trial court's refusal to issue an instruction on this issue. "Although an adverse instruction may be a proper response to a due process violation [citation], there was no such violation in this case. The trial court was not required to impose *any* sanction, including jury instructions." (*People v. Cooper* (1991) 53 Cal.3d 771, 811.)

III. *Exclusion of Defense Evidence*

A. *Background*

During in limine motions, appellant sought to admit evidence that some passengers in Paez's car were not wearing seatbelts at the time of the collision. The trial court held such evidence was not admissible.

Appellant's in limine motion also sought to admit evidence that Paez was speeding and intoxicated. The trial court ruled such evidence was admissible. However, the court subsequently excluded evidence that Paez had been charged with driving under the influence of alcohol on the night of the collision because such evidence was "prejudicial" and "not probative."

During trial, after the court found Paez to be an unavailable witness, appellant sought to introduce certain of Paez's statements to the police as statements against

interest. The trial court allowed the introduction of statements regarding the alcohol Paez consumed that night and his admission he was the driver of the black car, but found the following statement inadmissible: "I do not remember what street I was on or when I got in my vehicle. I remember being in the car and then police lights. I do not remember the crash at all." The trial court reasoned that Paez's lack of memory could have been due to his injuries rather than intoxication, and the statements therefore were not clearly against his interest.

B. *Analysis*

Appellant argues the trial court's exclusion of this evidence deprived him of his due process right to present a defense. We disagree.

As an initial matter, appellant does not appear to argue the exclusion of evidence was an abuse of discretion under state law. In any event, we see no abuse of discretion. (*People v. Wattier* (1996) 51 Cal.App.4th 948, 952–953 [trial court properly excluded evidence of victim's failure to wear seat belt because concurrent causes do not relieve criminal liability]; *People v. Medina* (1995) 11 Cal.4th 694, 769 ["mere arrests are usually inadmissible"]; *People v. Frierson* (1991) 53 Cal.3d 730, 745 [to determine "whether a statement is truly against interest within the meaning of Evidence Code section 1230, . . . the court may take into account not just the words but the circumstances under which they were uttered"].)

Moreover, the exclusion of evidence did not deprive appellant of the ability to present a complete defense. He was permitted to present evidence that Paez was under the influence of alcohol and drugs and was driving over the speed limit at the time of the collision, and to argue that Paez caused the collision. Where, as here, " ' "there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense," ' " due process is not violated. (*People v. Boyette* (2002) 29 Cal.4th 381, 428; accord, *People v. Thornton* (2007) 41 Cal.4th 391, 452–453 ["short of a total preclusion of defendant's ability to present a mitigating case to the trier of fact, no due process violation occurs"].)

Appellant's brief includes a short discussion of confrontation clause principles, but does not identify any witness he was prohibited from confronting or explain how his right to confront witnesses was violated. He has therefore waived this argument. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.) In any event, he has demonstrated no error. (*People v. Harris* (2008) 43 Cal.4th 1269, 1292 [" 'Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance.' "].)[5]

IV. *Pitchess Material*

Prior to trial, appellant filed a *Pitchess* motion seeking discovery of information in the confidential personnel records of certain police officers. The San Francisco Police Department agreed to provide certain categories of personnel records to the trial court for in camera review. Appellant now asks this court to conduct a de novo review of the documents reviewed by the trial court to determine if the court exercised proper discretion. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228 (*Mooc*) [review of trial court's decision on the discoverability of police personnel files is for abuse of discretion].)

We granted appellant's motion to augment the record with the sealed transcript of the *Pitchess* hearing and the documents reviewed by the trial court at that hearing. We have received the transcript from the trial court, but the documents reviewed by the trial court and the order issued at that hearing are missing from the trial court's file. At our request, the Custodian of Records for the San Francisco Police Department filed with this court an electronic copy of the personnel records provided to the trial court; and a copy of the protective order issued by the trial court, which attached a log created by the San Francisco Police Department identifying the records produced to the court and on which the trial court indicated which records were to be disclosed to appellant. This record is sufficient to enable meaningful appellate review of the trial court's decision. (*Mooc*,

[5] Because we have rejected appellant's claims of trial error, we also reject his contention that cumulative error violated his right to due process.

supra, 26 Cal.4th at p. 1228.) Having reviewed the record, we conclude the trial court did not abuse its discretion in declining to disclose certain records.

DISPOSITION

The judgment is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.